State	Discussion Topic	Issue	Comment Heading
Arizona	Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption
Arizona	Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption
Arizona	Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption

Comment Sub-Title

State CWA § 404 ESA-related Requirements

Permittees (and Possibly State) Liable under ESA without Section 7 or Section 10 Protection

Options to Resolve ESA Liability Issues under CWA § 404

Comment

To assume the CWA § 404 program, a state must demonstrate that its permit program will assure compliance with, among other things, the CWA § 404(b)(1) guidelines. The CWA § 404(b)(1) guidelines prohibit a state from issuing a permit if the discharge will jeopardize the continued existence of a listed threatened or endangered species or would likely adversely modify a critical habitat of a listed threatened or endangered species.**1** Once the state makes a jeopardy determination under the CWA, checked by EPA in its oversight role, the state's requirements under CWA § 404 are satisfied.**2**

While a state's CWA § 404 requirements may be satisfied by conducting a jeopardy determination, under CWA § 404, permittees often engage in activities that pose risks to threatened or endangered species listed under the Endangered Species Act (ESA) and their habitats. This in tum exposes permittees (and potentially the state) to liability under ESA. Therefore, before engaging in 404 activities, permittees often obtain incidental take conditions to avoid, minimize, or mitigate risk of "take." Incidental take permits or conditions are issued with approval by U.S. Fish and Wildlife Service under one of two sections of ESA, either Section 7 or Section 10. **3** In either case, only the federal government may issue incidental take provisions that shield actors from ESA liability. The Corps, as a federal agency, issues incidental take conditions in its CWA § 404 permits through formal consultation processes authorized under ESA Section 7, but a state may not because there is no federal nexus under ESA.

Therefore, if a state issues a CWA § 404 permit, no matter how substantively protective, a permittee would still be liable for an incidental take unless they obtain a Section 10 permit. However, the Section 10 process is recognized as being much more burdensome than Section 7 and is notorious for long timeframes. Further, it may also be possible, although not a legally settled issue, that a state regulator could be held liable for take At least two options may alleviate liability issues associated with a state 404 program. First, ADEQ recommends exploring the possibility to allow states to issue legally and environmentally protective incidental take permit conditions under ESA Section 7. This may require modifications to laws that extend beyond CWA § 404, but it could be an important step to ensuring efficient environmental protection. ADEQ recommends that EPA work with U.S. Fish and Wildlife at the highest levels to determine ways to address this critical issue. Second, states assuming the 404 program should have the option to negotiate an "off-ramp" process to

Arizona Partial Assumption	Application Process	Partial Assumption of 404
Arizona Partial Assumption	Application Process	Establish Balance of EPA-State Relationship in Rule

Partial Assumption of 404

Establish Balance of EPA-State
Relationship in Rule

Under the current state implementation rules, EPA may not approve partial assumption of the CWA § 404 program.**5** This rule was based on EPA's interpretation of the statute in context of the addition of a specific authorization for partial program approval under CWA § 402 in 1987, where no such provision was added for purposes of CWA § 404.**6** However, the CWA § 404 statute is silent on the issue and does not specifically preclude partial assumption. Therefore, ADEQ encourages EPA to revisit this interpretation. Given the circumstances of assuming a federal program, it may be reasonable that a state only assumes part of a program.

As mentioned above, given the apparent lack of federal nexus to allow a state to undergo Section 7 consultation, ADEQ recommends that EPA establish in rule the option for states to establish a process, in negotiation with the Corps and EPA, whereby the Corps would retain jurisdiction over permits for projects that have a likely adverse effect on threatened or endangered species.

ADEQ also recommends that EPA clarify in its rules whether a state must establish its own compensatory mitigation program in order to assume the CWA § 404 program. For example, an already established, Corps-enabled in-lieu fee program might be able to provide mitigation credits for a state-issued permit.
There is a concern that EPA will have a disproportionate and potentially unreasonable level of control over state 404 permit actions. This is in part because the rules lack the specificity necessary to ensure a balanced relationship.

For comparison, the statutory CWA § 404(j) permit objection process is similar in substance to that of the CWA § 402 NPDES program (33 U.S.C. § 1342(d)), but the implementing regulations are not. Rather, the bases for objection are much more specifically delineated in NPDES regulations than they are in CWA § 404 regulations.**7**

For example, NPDES regulations state that the EPA may object to the issuance of a permit if the permit "fails to apply, or to ensure compliance with, any applicable requirement of this part."**8** Whereas, 404 regulations state that EPA may object to a permit based on EPA's "determination that the proposed permit is....outside the requirements of the Act ."**9** While permits must be issued in compliance with the Act, EPA's regulations should delineate what this means for purposes of objection. It is specifically enumerated in the NPDES regulations what is expected and what the grounds are for objection. Therefore, ADEQ recommends that EPA more specifically delineate the grounds for any permit objection in 40 C.F.R. § 233.50, similar to the NPDES regulations, to ensure a clear and streamlined objection process that is directly related to the permitting action under CWA § 404.

Likewise, ADEQ recommends that EPA revise 40 C.F.R. § 233.51, which delineates the categories of permits for which EPA may not waive review ("non-waivable permits"). For clarity, EPA should specify that the basis for any objection is only as delineated in 40 C.F.R.
233.50. For example, EPA may not waive review of permits for discharges in "National and historical monuments." **10** While a discharge may be within a National monument that fact does not in itself give rise to an EPA objection to a state permit.

Arizona	Other	Funding	Funding and Resources
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Arizona	Enforcement & Compliance	404(b)(1)	404(b)(1)
Arizona	Partial Assumption	Application Process	Public Notice and Hearings

Limited Program Development Funding and No Dedicated Program Operation Funding

Human Capital Timing

Other Transitional Clarifications

n/a

Electronic Submittal and Notice of Information and Hearings

States need additional resources to develop and operate the CWA § 404 program. While some funding may be available to develop a CWA § 404 program through EPA Wetland Program Development Grants, these are competitive grants with limited application timeframes and limited allocation.

Also, there is no dedicated funding for operation of the CWA § 404 program. While some CWA § 106 funds may be used to support the CWA § 404 program, such funds often already support critical functions of state water quality protection programs under the CWA. Very little is left to fund an entire permitting program.

(a) Operation Funding Solution - Reallocate Funds

ADEQ recommends that proportional funding from the Corps' current budget should be allocated to states with approved CWA § 404 programs.

Should a state assume a CWA § 404 program, a proportional amount of funds should be allocated from the Corps to the State in order to support proper function of a state program. Therefore, any allocation should be based on the respective workloads of each agency to support the CWA § 404 program as a whole.

(b) Compensatory Mitigation Funding

Should a state develop a compensatory mitigation program, funding should be available not just for operation of the program, but also for technical improvements. Compensatory mitigation program is a sub-program to CWA § 404 permitting and requires significant resources above administrative costs. For example, identifying functions and values and assigning mitigation credits is a process that needs significant technical

It is unclear in the rules at what point staff must be hired and available to operate the CWA § 404 program, or whether, after demonstration of a state's fiscal capability and program plan, there could be a transition period between EPA-approval of the program and operation in order to fully staff the program.

The transition of authority to the Corps should be further addressed and clarified in rule. For example, it should be clarified which agency has the post-state assumption responsibility to oversee mitigation site

The 404(b)(1) Guidelines, while rules, are written as guidelines. This creates a lack of clarity and consistency across the country, between district engineers in the same branch, and between interpretations of different agencies (e.g. EPA v. Corps). The word "should" appears in the guidelines 81 times.**12** This includes how the requirements for alternatives, significant degradation factual determinations, and compensatory mitigation are to be implemented.

The lack of clarity found in Part 230 may cause rejection of initial applications and lead to debate between all parties (Corps v. EPA v. State v. Permittee v. NGOs). ADEQ recommends that EPA review the 404(b)(1) rules with all stakeholders to develop clarity for such provisions in rule so as to empower states to make reasonable and defensible decisions that are unlikely to be second-guessed by other parties.

ADEQ recommends reviewing the rules in 40 C.F.R. Part 233 for areas that should account for electronic submittal and notice of information. **13** In today's digital world, notice in newspapers should not be required and electronic submittals of information and permits should be allowed. EPA should also consider allowing for a web-based hearing option.

Arizona Partial Assumption	Application Process	Public Notice and Hearings
Arizona Partial Assumption	Application Process	Clarifications in 40 C.F.R. Part 233
Arizona Partial Assumption	Application Process	Clarifications in 40 C.F.R. Part 234

Timing of Notice and Comment

State-Issued General Permits

A.G. Certification - Takings Analysis

Further, timing of required notice and comment periods should align with other assumable programs, such as NPDES. Formal notice and comment is more effective once there is a draft of a permit available. Therefore, while simple notice of an application may be reasonable at the application stage, notice and comment should take place at the draft permit stage. A simple notice at the application stage will allow interested persons the opportunity to be aware of any potential impacts and engage with the agency about any potential concerns, The CWA § 404 statute and implementing regulations contemplate that a state may develop a general permit program for CWA § 404. State general permits, which may be very similar to nationwide permits, would still be state-issued general permits pursuant to a state's own general permit program authorized under CWA § 404. However, there are currently some confusing statements in Part 233 regarding state general permits.

For example, EPA regulations state that the "decision not to assume existing Corps general permits does not constitute a partial program" and "the discharges previously authorized by general permit will be regulated by State individual permits."**14** This statement seems to imply
that if a state's general permit does not exactly equal Corps general permits, the state's permit qualifies only as an individual permit.

Therefore, EPA should remove language in 40 C.F.R. Part 233, including 40 C.F.R. § 233.21, that implies that state general permits must match exactly Corps nationwide permits if the state issues a general permit that covers activities for which the Corps issues general permits. Rather, EPA should clarify that a state general permit program may consist of general permits that are appropriate for the state and align with CWA § 404 Pursuant to CWA § 404(g), with the program submittal and description, a state "shall submit a statement from the attorney general.....that the laws of such State....provide adequate authority to carry out the described program." EPA regulations further mandate that the statement "contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State' s program." 40 C.F.R. § 233.12(a). EPA should clarify in rule or provide additional

Tribal Affiliation	Discussion Topic	Issue
Bad River Band of Lake Superior Tribe of Chippewa Indians	Other	Rulemaking Process
Bad River Band of Lake Superior Tribe of Chippewa Indians	Enforcement & Compliance	Mitigation
Bad River Band of Lake Superior Tribe of Chippewa Indians	Enforcement & Compliance	Mitigation
Bad River Band of Lake Superior Tribe of Chippewa Indians	Enforcement & Compliance	Mitigation
Bad River Band of Lake Superior Tribe of Chippewa Indians	Enforcement & Compliance	Endangered Species Act

Comment Heading	Comment Sub-Title
n/a	n/a
Differences in Federal and State Wetland Laws	n/a
Implementation of Federal Wetland Law and Compensatory Mitigation	n/a
Other Federal Environmental Laws	n/a
Other Federal Environmental Laws	n/a

Comment

Because of the lack of a draft rule on revisions to Clean Water Act Section 404(g), we believe that it is premature to seek consultation and that meaningful consultation and coordination on a government-to-government basis cannot occur without a draft or in the time period form October 22-December 21, 2018. There was a "Tribes-only Information Webinar" on "404(g) rulemaking" on November 20, 2018 and November 29, 2018 (Webinar) offered. That was helpful in terms of basic information from US EPA. The Webinar was not government-to-government consultation, however.

For a state to assume permit review authorized by Section 404 of the Clean Water Act, the State's law must be as stringent as the Clean Water Act and the implementing regulations per 40 C.F.R Sec. 233.1(d). In the event that state regulatory program underlying the program authorized by Section 404 is less stringent than federal or were to be reduced in any respect, either statutorily or administratively, tehn its laws would not meet the requirements of Section 404.

Section 404 of the Clean Water Act requires permit applications to first avoid, and then minimize, impacts to aquatic resources. This process, at the federal level, includes a third step that generally requires applicants to provide compensatory mitigation for unavoidable impacts to aquatic resources.

Mitigation is primarily based upon an assessment of aquatic resource function service loss versus functional service gain. In contrast, it has been our experience that a state will legislate requirements for this type of mitigation without considering watershed location, function, and timing.

As a federal action, the issuance of a Section 404 Clean Water Act permit is typically subject to other federal environmental laws. For example, large or complex projects require preparation of an Environmental Impact Statement. Preparation of these documents is more efficient when state or tribal government participates as a cooperation agency. (See 40 C.F.R. Sec 1505.5). Should state law either legally or practically preclude a cooperating agency, it would necessarily force federal review.

In addition, field reviews for large complex projects provide key information to better assess important natural resources. From a permitting standpoint, federal guidelines regarding public interest review require consideration be given to the effect the proposed activity will have historic properties and archaeological resources, and importantly Indian religious or cultural sites.

Last, Section 404 Clean Water Act permits routinely include consultation with the U.S. Fish and Wildlife Service regarding impacts to listed species under Section 7 of the Endangered Species Act (ESA). These Section 7 consultations are subject to judicial review under the ESA in federal district court.

If a state were to assume the Section 404 Program it is unclear how it would protect endangered species, including formal consultation, a biological opinion, and dispute resolution. It is also unclear how the state would adequately coordinate with the tribes on historic properties, archeological resources, and importantly Indian religious or cultural site.